Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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November, 1996

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QUESTION PRESENTED

1. Where the trial court set aside a jury verdict awarding punitive damages, and the court of appeals reinstated the finding of liability but remanded for remittitur or retrial of the amount, does the judgment entered after remittitur draw interest from the date it entered or from the date of the jury's initial, excessive, verdict?

LIST OF PARTIES

Two parties involved at earlier stages of this litigation are not named as such in this Petition. Defendisk, Inc. was dismissed from the action before submission of the case to the jury. Grynberg Petroleum Company, although listed in the caption of the Tenth Circuit Court of Appeals as "a Colorado corporation," is in fact a sole proprietorship owned and operated by Petitioner Jack J. Grynberg, and was referred to accordingly in the United States District Court, where the case was tried.

The names of all other parties appear in the caption of this Petition.

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PETITION FOR WRIT OF CERTIORARI

Jack J. Grynberg respectfully petitions the Court to issue a writ of certiorari to review an order in this case withdrawing and amending a mandate of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals (Appendix B, *infra,* at App. 5-25), is reported at 44 F.3d 1947 (10th Cir. 1995) (hereinafter *Klein I*). The Supreme Court's denial of Petitioner's petition for writ of certiorari to review that decision is reported at 116 S.Ct. 58 (1995). The Order as to which review is now requested is reproduced as Appendix A, *infra,* at App. 1-4.

JURISDICTION

The court of appeals' Order recalling and amending the mandate (Appendix A, *infra,* at App. 1-4) issued August 6, 1996. Judgment entered August 9, 1996. Jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute allowing interest on money judgments recovered in United States district courts, 28 U.S.C. § 1961, is reproduced as Appendix C, *infra*, at App. 26-27.

STATEMENT OF THE CASE

This matter comprises two cases consolidated by the United States District Court for the District of Colorado, one of which respondents commenced in that court and one of which was removed from the state court under 28 U.S.C. §§ 1441 and 1446. In both instances, jurisdiction in the federal court arose under 28 U.S.C. § 1332(a)(2), diversity of citizenship.

Respondents claim to have invented a technique to protect computer software from unauthorized copying. The parties asserted numerous claims and counterclaims arising out of their venture to finance, develop, market and produce a product using that technique. The dispute was tried before a jury.

On March 31, 1992, the jury returned its verdicts, including awards of $1.00 compensatory damages to each of the three individual respondents for breach of fiduciary duty, and $1 million to each of them for punitive damages on that claim. The district court entered judgment notwithstanding the verdict, setting aside the punitive awards in their entirety. Respondents appealed. The Tenth Circuit Court of Appeals reversed, finding that respondents had established entitlement to punitive damages, but agreeing with the trial judge's assessment of the

jury's award as excessive. The court of appeals therefore remanded the case to the district court for remittitur proceedings (Appendix B, *infra*, at App. 2-25). This Court declined to hear petitioner's jurisdictional challenge to that decision. *Grynberg v. Klein*, 116 S.Ct. 58 (1995).

The district court entered its remittitur order on March 15, 1996, granting each of the respondents $200,000 in punitive damages. All three accepted that award. Judgment on the remitted verdict entered April 19, 1996. Petitioner appealed that judgment to the Tenth Circuit Court of Appeals (hereinafter *Klein II*), where the matter now awaits briefing.

The court of appeals made no provision in *Klein I* for interest on the punitive damage award. Nor did the district court's March, 1996 remittitur order (*see* Appendix A, *infra*, at App. 2).

In May, 1996, respondents moved the district court to tax postjudgment interest on the remitted punitive damage award beginning March 31, 1992, the date of the vacated jury verdict. Reasoning that *Klein I* constituted a complete reversal of its judgment and that *Klein I* provides that the judgment will become final only upon acceptance of remittitur or a new trial, the district court denied the motion (Appendix D, *infra*, at App. 28-31). Respondents then filed a "Motion for Limited Recall of the Mandate" in *Klein I*.[1] The *Klein I* panel granted

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[1] Respondents simultaneously filed a Notice of Cross-Appeal in *Klein II*, seeking review of the district court's denial of their interest request by that procedure as well. They voluntarily dismissed the cross-appeal after the panel in *Klein I* recalled and reissued the mandate, the Order here at issue.

respondents' request (Appendix A, *infra*, at App. 1-4), withdrawing and revising the mandate to provide that interest on the 1996 remitted judgment would run from March 31, 1992, the date of the jury's original verdict. In reaching that result, the *Klein I* panel followed the rule prevailing in the First, Third and Tenth Circuits that interest runs from the date of the original judgment if post-trial proceedings set aside the amount of a verdict but not the determination of liability.

REASONS FOR GRANTING CERTIORARI

With recent attention to the constitutional dimensions of punitive damage verdicts, post-trial review of such awards is now routine. As a result, the question of how interest will accrue on those awards arises with increasing frequency and assumes growing importance. The problem is particularly acute where review results in remitted awards or retrial of punitive damage claims, since the various circuit courts of appeal apply inconsistent and conflicting rules in such cases. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), the Supreme Court announced rules to make uniform the treatment of postjudgment interest when an initial judgment is vacated and supplanted by a later, sustainable award. But the circuit courts of appeal have struggled with *Kaiser* in circumstances where part of the earlier

judgment survives, as where a finding of liability is sustained but the assessment of damages is reversed. The courts of appeal have not applied common or consistent standards in taxing interest in such circumstances, and have independently developed conflicting and contradictory local rules governing postjudgment interest on retried and remitted awards. The penal and noncompensatory nature of punitive damages exacerbates the inconsistency where, as here, the reviewing court upholds a plaintiff's right to punitive damages but reduces the award or remands it for redetermination.

The Court can resolve the conflict among the circuits and effectuate the salutary purposes of punitive damages by determining the event from which a remitted or retried punitive damage award draws interest. At a time questions about punitive damages increasingly command the attention of legal commentators, the courts, the media and the public, the issue presented by this case typifies a significant concern about this controversial and evolving remedy. Indeed, in recent years the Supreme Court has dealt with punitive damages on several occasions.[2] Most recently the Court did so in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), where it more fully elucidated the constitutional principles impinging on punitive damage awards. Many cases will soon reach the circuit courts

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[2] *See Honda Motor Co., Ltd. v. Oberg*, 114 S.Ct. 2331 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

seeking the analysis prescribed in *BMW* and its predecessors. With the heightened awareness of constraints on punitive damages, modifications, remands and remittiturs of punitive damage awards will become more common. In this environment, the courts of appeal need uniform guidance on application of the federal interest statute, 28 U.S.C. § 1961, to punitive damage judgments, particularly in light of the conflict that already exists among the circuits.

I. THE CIRCUIT COURTS APPLY DIVERGENT AND CONFLICTING RULES TO THE TAXATION OF INTEREST ON AWARDS ENTERED AFTER REMITTITUR OR RETRIAL OF DAMAGE VERDICTS.

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), the Court held that when a series of judgments results from post-trial proceedings and appeals, interest under 28 U.S.C. § 1961 begins to accrue upon entry of the judgment in which damages are ascertained in a "meaningful way." *Id.* at 836. Three judgments had entered in that case. The first, a directed verdict for the defendant, was reversed on appeal; the district court vacated the second, a verdict for plaintiff, as to the damage award, and ordered retrial of that issue; the third, which followed that retrial, was set aside by the trial court but reinstated on appeal. *Id.* 829-30. The Supreme Court held that damages were not " 'ascertained' in any meaningful way" until the third judgment, despite the earlier finding of liability, and that interest should run from the date the last judgment entered. *Id.* at 836.

Divergent understandings and interpretations of the concept "ascertained in a meaningful way" have resulted in conflicting rules among the circuit courts of appeal. Two basic approaches have evolved along the way. One, followed in the First, Third and Tenth Circuits, holds that the degree to which an earlier judgment is reversed or modified determines whether damages have been sufficiently ascertained to allow interest from that judgment. Under that approach, if liability is established in the initial judgment, substantial revision of the damage award, even to the extent of completely vacating that part of the judgment, will not prevent interest from accruing from the earlier date. In contrast, the Sixth and Eighth Circuits, and perhaps the Eleventh, follow a rule focused more on the damage aspect of the judgment, and will not allow interest from the first of two judgments unless the earlier judgment contains a liquidated or computable damage award that is sustained on appeal. A wide gulf separates the two approaches.

The Tenth Circuit, as exemplified by its decision in this case (Appendix A, *infra*, at App. 1-4), leads and typifies those circuits which look to the degree to which a judgment is reversed or modified in determining when the interest clock starts running. Here, the court of appeals upheld the district court's determination that the jury's punitive damage assessment could not be sustained (Appendix B, *infra*, at App. 20). It remanded the issue for further evidentiary consideration and for remittitur or retrial because the jury's initial award "seems excessive" and because "there is inadequate evidence in

the record" on one of the required elements (*id.*). Nevertheless, following its own precedent, and without mentioning *Kaiser*, the Tenth Circuit concluded that because it reinstated the liability aspect of the jury's punitive damage verdict, the required reassessment of damages was a monetary issue, and therefore "a matter of degree," (Appendix A, *infra*, at App. 3) (citing *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987), *cert. dismissed*, 486 U.S. 1063 *and Cities Service Gas Co. v. Mobil Oil Corp.*, 487 U.S. 1265 (1988)). *Hegler* predates *Kaiser*, but the decisions in both this case and other current Tenth Circuit opinions adhere to the notion that alteration of damage amounts does not warrant a delay of the interest commencement date.

For example, in *Stewart v. Donges*, 20 F.3d 380, 382 (10th Cir. 1994), the court held "when 'an initial quantified judgment is later decreased, interest runs from the date of the earlier quantified judgment,' " citing *Wheeler v. John Deere Co.*, 986 F.2d 413, 416 (10th Cir. 1993) (interest allowed from the second judgment rather than the third when reversal of the earlier was not on liability grounds, but altered the amount of the award).

This result seems in direct contradiction of *Kaiser* where, as in the present case, the earlier judgment established liability but not damages, which were finally determined in the later judgment. Nevertheless, the First and Third Circuits join the Tenth in holding that a prior judgment must be completely vacated on the merits in order for interest to run from a subsequent award.

The First Circuit followed the Tenth in looking to " 'the extent to which the case was reversed' in order to

decide from which judgment . . . interest should accrue." *Cordero v. De Jesus-Mendez*, 922 F.2d 11, 15 (1st Cir. 1990) (quoting *Hegler*, 818 F.2d at 737). *Cordero's* facts strongly resemble those of both the instant case and *Kaiser*: the first jury verdict was vacated as to damages, which were reassessed after remand. *Id.* at 15-16. A split panel distinguished *Kaiser*, because the second trial was necessitated by erroneous jury instructions, not insufficient evidence, and the first jury "could" have made a fair damage award if it had been properly instructed. *Id.* at 18. That distinction seems dubious,[3] but at best it appears that while acknowledging *Kaiser*, the First Circuit construes its holding very narrowly.

The Third Circuit stated its rule in *Dunn v. HOVIC*, 13 F.3d 58 (3d Cir. 1993). The jury awarded compensatory damages of $1.3 million and punitives of $25 million. *Id.* at 59. The district court remitted the verdicts to $500,000 and $2 million, respectively. *Id.* On appeal, the compensatory award was affirmed, but punitive damages were further reduced to $1 million. *Id.* at 60. Defendant also challenged the district court's allowance of interest from the jury verdict, arguing, under *Kaiser*, "that judgment did not 'ascertain[ ]' the damages 'in any meaningful way.' " *Id.* The court of appeals affirmed the interest

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[3] In dissent, Selya, J. saw no distinction:

> *[Kaiser's] ratio decidendi* comfortably embraces the case at hand. We must obey the Court, and such obedience transforms here into plain duty. The postjudgment interest clock began to tick only on the date the second judgment was entered.

Cordero, 922 F.2d at 20.

award on the ground that in *Kaiser* the entire damage verdict was overturned, whereas in *Dunn* the award was remitted, *id.*, even though total damages were reduced from $26.3 million to $1.5 million and the factors used to determine punitive damages on appeal differed from those employed by the district court. *Id.* at 61. The opinion applied the same test relied on by the Tenth and First Circuits:

> Moreover, although it was determined by the district court and later on appeal that the jury's damage award was too high, the entire award was not vacated, but was merely reduced.

Id. As with those courts, the Third Circuit construes *Kaiser* narrowly, embracing the precept that interest runs from the later of the two judgments only when the first is wholly vacated.

In contrast with the First, Third and Tenth Circuits' narrow interpretation of *Kaiser*, the Second, Sixth and Eleventh Circuits allow interest from the later of two judgments if the first is deficient in its damage assessment. Underlying this approach is concern that damages are not "meaningfully ascertained" until they are quantified and unconditional.

In *Andrulonis v. United States*, 26 F.3d 1224 (2d Cir. 1994), interest under 28 U.S.C. § 1961 on an affirmed contribution judgment was deferred until the amount due was liquidated and paid by the party entitled to contribution. Following *Kaiser*, the court determined that until that point the damages were either undetermined or conditional, and thus not ascertainable to the extent needed to justify the accrual of interest. *Id.* at 1234-35.

The Sixth Circuit construed and applied *Kaiser* in *Adkins v. Asbestos Corp., Ltd.*, 18 F.3d 1349 (6th Cir. 1994). There, as here, the Court affirmed the earlier judgment as to liability, but remanded the damage award for further findings of fact. When the district court arrived at a damage amount different from its original judgment, the court of appeals decreed interest would run from the judgment entered after remand, as only at that point were the damages "meaningfully ascertained." *Id.* at 1352.

The Eleventh Circuit has not addressed the issue head on, but in *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 997 F.2d 1340 (11th Cir.), *cert. denied*, 114 S.Ct. 604 (1993), indicated its inclination to follow the rule adopted by the Second and Sixth Circuits. The opinion, in *dicta*, acknowledged that:

> When the judgment on remand, though for the plaintiff, differs in some way from the original judgment, it may also be unfair to force the defendant to pay interest from the earlier date, because the correct amount of damages may not have been sufficiently ascertainable until after appellate review.

Id. at 1343 n.2. With that approach, the Eleventh Circuit would join the Second and Sixth in their understanding of *Kaiser*.

Had the present case arisen in either the Second or Sixth Circuits, and perhaps in the Eleventh, a different result would have obtained than decreed by the Tenth Circuit or than would have eventuated in the First and

Third Circuits.[4] This conflict in the implementation of *Kaiser* constitutes a real and meaningful difference in the jurisprudence of the respective Circuit Courts of Appeal.

II. RECOGNIZING THE UNIQUE CHARACTERISTICS OF PUNITIVE DAMAGES, THE SUPREME COURT SHOULD ESTABLISH THE EVENT FROM WHICH POSTJUDGMENT INTEREST ACCRUES ON PUNITIVE DAMAGE AWARDS.

The timing of interest accrual on punitive damage awards should reflect their nature and purpose. Because such damages serve to penalize one party and to deter future transgressions, but not to compensate the other, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981), the beneficiary of the award suffers no diminution of his remedy while an unliquidated or modified award undergoes judicial review. For that reason, punitive damages do not accrue prejudgment interest. Indeed, for the recipient, punitive damages represent a windfall. *Id.*, at 50; *International Bro. of Electrical Wkrs. v. Foust*, 442 U.S. 42, 50 (1979). The mulcted defendant, on the other hand, realizes considerable and real disadvantage if postjudgment interest accrues too soon.

Consequently, the concern for protecting an injured party's reparative recovery from erosion by the passage of time justifies interest on compensatory awards but does not apply to punitive damages. Instead, interest on

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[4] Even if the Tenth Circuit has correctly construed *Kaiser*, it has misapplied that case in its analysis here. Reversing the trial court and reinstating the liability verdict constitutes a complete reversal of the judgment under review.

punitive damages, perhaps more than on any other kind of award, should run from the date an appropriate punishment is determined, whether that time comes before, upon or following appeal.

This case exemplifies the situation. The district court determined that as of March, 1996, a $600,000 award would satisfy the social purpose of punitive damages while staying within applicable constraints, including those imposed by the Constitution and articulated by this Court. If, as the Tenth Circuit decreed, interest began accruing on March 31, 1992, it already totaled $119,416.58 by April 19, 1996, when the remitted judgment entered. Even if $600,000 passed constitutional muster, no reviewing court made any such determination about a $719,416.58 imposition, a figure twenty percent greater than the court decreed. Certainly, the district court did not contemplate such enhancement of its judgment, as evidenced by its denial of respondents' request that interest be taxed during the four years preceding entry of the award. (Appendix D, *infra*, at App. 28-31).

In crafting an adequate punishment and deterrent, the court or jury must determine what size penalty will have the desired effect. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1595 (1996). The court of appeals here recognized that doing so requires knowledge of "defendant's *current* economic status" (Appendix B, *infra*, at App. 20) (emphasis supplied). That information loses all meaning and utility when a significant component of the award reflects only the passage of time, and nothing of the defendant's conduct, the plaintiff's injury or the defendant's ability to pay. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993). Moreover, if

the court determines that a defendant can and should pay a given amount, adding interest from the date of a superseded judgment pegs the penalty at a sum necessarily greater than that deemed appropriate. In other words, allowing interest to accrue before ascertainment of the correct amount will result in the imposition of a tainted, and probably excessive, award.

One in petitioner's place cannot stop inflation of the debt by payment. During the four years between the time the district court vacated the punitive damage verdict and the date it issued its remittitur, there was no determinable amount to pay. A defendant faces an equally harsh predicament when the trial court enters judgment on a defective punitive damage verdict. To avoid enhancement of the punishment while pursuing his constitutional right of review, the defendant must arrange to pay the invalid judgment. Requiring him to do so severely impairs the very rights that review is designed to protect. He is forced to part, even if temporarily, with funds that are rightfully his.

Punitive damages are constitutionally constrained, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), and the awards are entitled to judicial review. *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331, 2342 (1994). If interest is allowed to accrue before the courts rationally determine the extent of the penalty, exercise of the right to review will be chilled by the prospect of a pyrrhic victory in which the punishment is diminished because of its excessiveness but augmented by the accrual of interest. *Kaiser's* emphasis on commencing interest when the amount is meaningfully ascertained thus seems particularly suited to punitive damages, unburdened as they

are of the concern that attends compensatory awards for protecting an injured party's reparation.

Interest, of course, serves also to deter abuse of the appellate process by dissuading a litigant from pursuing review simply for the purpose of delay. *Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988). The principle articulated in *Kaiser*, however, addresses that concern. Under *Kaiser's* approach, a punitive damage award that is affirmed or enlarged on appeal draws interest from the date it enters, and the defendant will have realized no advantage from the delay.

By confirming that punitive awards that are reduced following remand for remittitur or retrial become "meaningfully ascertained" only after the remand judgment enters, the Court can protect the rights of all parties while preserving the intended objectives of these "private fines leveled by civil juries." *Foust*, 442 U.S. at 48.

CONCLUSION

For the reasons stated herein, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HENRY KLEIN, (Realigned as Plaintiff); GUR SHOMRON, AMIRAM GRYNBERG, DEFENDISK LIMITED, an Israeli corporation,	)	Nos. 92-1232 92-1233
Plaintiff/Appellants	)	
v.	)	
JACK J. GRYNBERG, (Realigned as Defendant); DEFENDISK, INC., a Colorado corporation (Realigned as Defendant); GRYNBERG PETROLEUM COMPANY, a Colorado corporation,	)	
Defendants/Appellees	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 84 S 2429 and 84 S 1593)
(Filed Aug. 6, 1996)

Before KELLY AND McKAY, and ROSZKOWSKI, Senior District Judge.

ROSZKOWSKI, Senior District Judge

ORDER

This matter is before the Court on Plaintiffs' Motion for Limited Recall of the Mandate to establish March 31, 1992, as the date from which post-judgment interest should accrue. For the reasons that follow, the motion is granted.

On March 31, 1992, judgment was entered on the jury's verdict in favor of the Plaintiffs, awarding compensatory damages for breach of contract and breach of fiduciary duty, punitive damages for breach of fiduciary duty and post judgment interest on all awards at the rate of 4.58% until paid in full. On June 29, 1992, and August 26, 1992, the District Court entered amended judgments striking the $3,000,000 punitive damage award. On appeal, this Court reversed the lower court, reinstated the punitive damage award and remanded the case with instructions that a remittitur be granted, but that the Plaintiffs be awarded significant punitive damages. *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995). The decision was silent as to the issue of post-judgment interest.

On remand, the Plaintiffs accepted a remittitur, and on April 19, 1996, the District Court entered judgment for punitive damages in the amount of $600,000. The judgment of the District Court did not address the issue of post-judgment interest. The Plaintiffs now submit this

Motion seeking a recall of the mandate for the purpose of establishing March 31, 1992, the date judgment was entered on the original jury verdict, as the date from which post-judgment interest is to accrue with respect to the punitive damage award in the amount of $600,000.

Rule 37 of the Federal Rules of Appellate Procedure states that the matter of interest should be disposed of by the mandate. In cases where the matter of interest is simply overlooked, as in this case, the Rule provides that a party may seek recall of the mandate for a determination of the issue.

When a jury verdict is reinstated for the plaintiff, interest should be awarded from the date of the original judgment. *DeLong Equipment v. Washington Mills Electro,* 997 F.2d 1340 (11th Cir. 1993). This is necessary to protect the integrity of the jury verdict. *Id.* In *Northern Natural Gas Co. v. Hegler,* 818 F.2d 730, 737 (10th Cir. 1987), this Court stated that interest should run from the date of the original judgment when a reversal "was not on any basic liability errors or errors in procedure which affected the basic issues, *but on a dollar value* (emphasis added), a matter of degree." That is the case here. The jury verdict was reinstated, and the only thing at issue was the amount of punitive damages that should be awarded. The defendant's culpability was not in question, only the amount he should be required to pay the plaintiffs.

If the District Court had merely granted the remittitur at the time the motion for judgment notwithstanding the verdict was filed, interest would run from the date of the original judgment. *See, e.g., Coal Resources v. Gulf & Western Industries,* 954 F.2d 1263, 1274-75 (6th Cir. 1992)

(Distinguishing those cases in which a new trial was ordered on damages from those in which a remittitur was granted, and holding that in the latter case, interest should run from date of original judgment.); *Litwinowicz v. Weyerhaeuser Steamship Company,* 185 F. Supp. 692, 693-94 (E.D. Penn. 1960) (Interest accrues on reduced amount from the date of judgment on the greater amount because the judgment was modified, not vacated.); *Brocklehurst v. PPG Industries, Inc.,* 907 F. Supp. 1106, 1109-10 (E.D. Mich. 1995) (Because plaintiff's consent to remittitur did not create a new judgment, but only modified a prior judgment, interest accrues from the date of the initial judgment.). Because the District Court erred should not change the result. "That the District Court erroneously set aside the earlier judgment should not result in a transfer of wealth from [defendant] to the victim, [plaintiff]." *DeLong,* 997 F.2d at 1342. "Calculating interest from the date of the second judgment would penalize [the plaintiff] for a trial judge's error." *Cordero v. DeJesus-Mendez,* 922 F.2d 11, 18 (1st Cir. 1990).

For these reasons, Plaintiffs/Appellants' Motion for Limited Recall of the Mandate for the purpose of establishing March 31, 1992, as the date from which post-judgment interest is to accrue with respect to punitive damages in the amount of $600,000.00, is granted. Post-judgment interest on the punitive damage award of $600,000 is allowed at the rate of 4.58 percent.

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HENRY KLEIN, (Realigned as Plaintiff); GUR SHOMRON, AMIRAM GRYNBERG, DEFENDISK LIMITED, an Israeli corporation,	)	Nos. 92-1232 92-1233
Plaintiffs/Appellants	)	
v.	)	(Filed Jan. 19, 1995)
JACK J. GRYNBERG, (Realigned as Defendant); DEFENDISK, INC., a Colorado corporation (Realigned as Defendant); GRYNBERG PETROLEUM COMPANY, a Colorado corporation,	)	
Defendants/Appellees	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 84 S 2429 and 84 S 1593)

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Donald W. Alperstein, ALPERSTEIN & COVELL, P.C., Denver CO., appearing for Defendants/Appellees, Jack Grynberg and Grynberg Petroleum Company.

Before KELLY AND McKAY, and ROSZKOWSKI,* Senior District Judge.

ROSZKOWSKI, Senior District Judge

This is an appeal from a judgment notwithstanding the verdict entered by the District Court of Colorado. The suit arose out of a contract between the parties to develop and market a computer software security system invented by the plaintiffs. Following a jury trial in which the plaintiffs essentially prevailed, the District Court struck much of the award and entered judgement as a matter of law for defendants. For the reasons that follow, we affirm that judgment in part and reverse in part.

Background

The story of this litigation begins over ten years ago when plaintiffs-appellants Ami Grynberg, Henry Klein and Gur Shomron invented a means of protecting computer software against unauthorized copying and piracy. In 1983, they obtained patents in the United States and Israel, and formed Defendisk Limited, an Israeli corporation, to develop and market the Defendisk system.

Hoping to market the product in the United States, the plaintiffs sought financing from defendant Jack Grynberg, a sophisticated international businessman and the uncle of Ami Grynberg. In December of 1983, the parties

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*The Honorable Stanley J. Roszkowski, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

entered into a written agreement ("the December agreement") which provided for the formation of Defendisk, Inc., a corporation devoted to researching, developing and marketing the Defendisk system. Under the agreement, plaintiffs would contribute the technology and Jack Grynberg would finance the corporation. Defendant agreed to provide up to $350,000 to cover all costs and development, to obtain a $350,000 bank line of credit, and to make payments at a rate of $39,000 per month. Pursuant to the agreement, 50 percent of the new corporation would be owned by Jack Grynberg and 50 percent by plaintiffs.

On December 10, 1983, Jack Grynberg incorporated Defendisk, Inc., and appointed himself and two employees of Grynberg Petroleum as officers and directors. To start operations, plaintiffs provided confidential and trade secret information and technical support to defendants. Defendisk, Inc., enjoyed early success, entering into contracts for the sale of the Defendisk system to software manufacturers for over $500,000 in revenue, but relations between the parties soon deteriorated and the business quickly fell apart. Among other things, no shareholders agreement was ever drafted, no shares of Defendisk, Inc., were ever issued to plaintiffs, and defendant never obtained a bank line of credit.

The parties disagree on the cause of the breakdown. Plaintiffs allege that Jack Grynberg engaged in a deliberate campaign of abusive treatment, sabotage and deceit in order to divide the plaintiffs and seize the corporation and the benefits of the Defendisk system for himself. Defendants dispute the facts as presented by plaintiffs in

several respects. There is testimony in the record to support both plaintiffs' and defendants' version of the events. However, judging by the verdict, the jury accepted plaintiffs' account. Defendants do not dispute the factual finding of the jury that a breach of contract and a breach of fiduciary duty did occur, and the District Court did not overturn those findings. In addition, when reviewing a judgment notwithstanding the verdict, we must view the evidence in the light most favorable to the party which prevailed at trial. For these reasons, we set forth plaintiffs' version of the facts.

Following the December agreement, plaintiff Henry Klein traveled to this country to provide assistance with the start-up venture. Klein was a man of 34 years whose entire life had been focused on mathematics and computer technology. He was naive and unsophisticated with respect to the business world, and he was nervous about being in an unfamiliar foreign country.

Shortly after his arrival in Denver, Jack Grynberg began a campaign of abusive treatment towards Klein, ostensibly to create a division between him and the other plaintiffs. Defendant told Klein, Shomron and Ami Grynberg conflicting stories, thereby creating confusion, resentment and dissension among the plaintiffs. For instance, defendant told Klein that he was being cheated by his partners and encouraged him to seek a higher percentage of shares than the others, while at the same time, he told Gur Shomron and Ami Grynberg that Klein was creating problems by asking for a higher percentage of shares. Defendant also urged Klein to sue his partners and to place a lien on their interests. Jack Grynberg's outrageous behavior so affected Klein that he was unable

to eat or sleep, and he desired to return to Israel. To prevent him from leaving, defendant threatened him with a phony lawsuit for over $40,000,000.

In the following months, defendant falsely represented that he had issued stock in the United States company, and then persuaded Gur Shomron and Ami Grynberg to provide all the confidential information and technical support necessary to allow defendants to produce the Defendisk system without plaintiffs. Jack Grynberg also feigned interest in, but never followed through on, finalizing a shareholder agreement with plaintiffs, fully funding the venture, and placing plaintiffs on the Board of Directors of the company.

At the same time, Jack Grynberg continued to harass Klein and to drive a wedge between him and his partners, Ami Grynberg and Gur Shomron. Plaintiffs allege that defendant: (1) threatened Klein with criminal prosecution; (2) convinced Shomron and Ami Grynberg to join in a lawsuit against Klein for his alleged impairment of the Defendisk System; (3) threatened to sue Klein's attorneys personally; (4) misrepresented to Klein that he and his nephew Ami Grynberg had a secret agreement to vote their shares together, which would allow them to control the company; (5) misrepresented to Ami Grynberg and Gur Shomron that Klein was demanding a greater percentage of the stock; and (6) accused Klein of stealing the Defendisk system from an Israeli professor.

By the end of June of 1984, Jack Grynberg had secured complete control over all of the proprietary and confidential information concerning the Defendisk system. He drove the company's president out and assumed

all managerial control. He refused to execute a shareholder agreement, to issue shares of stock to plaintiffs, or to allow plaintiffs a say in the operation of the company. He refused to fund development, marketing, or production of the Defendisk system, or to provide a line of credit to enable Defendisk, Inc., to begin full scale production. He would not allow Defendisk, Inc., to operate independently of Grynberg Petroleum Company. He excluded the plaintiffs from any involvement in Defendisk, Inc., and instructed his employees not to allow them on the business premises. Thereafter, Jack Grynberg sought to obtain an independent patent on the Defendisk system.

Plaintiffs allege that by excluding them from Defendisk, Inc., defendant kept the company from adapting to a rapidly changing technological environment. Ultimately, Jack Grynberg's actions prevented plaintiffs from utilizing the window of opportunity to successfully market their invention.

In addition to the foregoing, plaintiff Ami Grynberg alleges that defendant interfered with his prospective business relations in connection with another security device that he invented, the Personal Electronic Access Key ("PEAK"). After the December agreement, Jack Grynberg introduced Ami Grynberg to potential investors who requested the business plan for the PEAK product. Ami Grynberg then scheduled meetings with the investors, but the meetings never took place. Plaintiff alleges that the investors refused to meet with him because of a written request made by Jack Grynberg that they refrain from doing so. In addition, Ami Grynberg alleges that Jack Grynberg claimed to have a "grub stake"

in the PEAK product, which prevented him from securing alternate financing.

Procedural History

In December of 1984, plaintiffs filed suit in the District Court of Colorado alleging breach of contract, breach of fiduciary duty, fraud, misappropriation of trade secrets, and conversion regarding the Defendisk system and Defendisk, Inc. Plaintiff Ami Grynberg also brought a claim for tortious interference with prospective business advantage regarding the PEAK device. Defendants asserted counterclaims similar to those claims brought by plaintiffs, as well as a claim for unjust enrichment relating to the PEAK device.

The case was finally brought to trial in February of 1992. After six weeks of testimony, the jury awarded Ami Grynberg $166,000, Gur Shomron $166,000, Henry Klein $186,000, and Defendisk, Limited, $1.00 on the breach of contract claim. They awarded each plaintiff $1.00 in actual damages on the breach of fiduciary duty claim, and $1,000,000 each to Ami Grynberg, Gur Shomron and Henry Klein in exemplary damages. They awarded Ami Grynberg $200,000 in actual damages and $350,000 in exemplary damages on the tortious interference with prospective business advantage claim. The jury found in favor of defendants on the remainder of plaintiffs' claims. The jury also found in favor of defendants on the counterclaim for unjust enrichment and awarded $10,000 in damages. Judgment reflecting the jury's verdict was entered on March 31, 1992.

On June 24, 1992, the District Court held a hearing on post-trial motions. At that time, the court entered judgment as a matter of law striking the exemplary damage awards for breach of fiduciary duty. The court also entered judgment as a matter of law for defendants on the claim for tortious interference with prospective business advantage. Finally, the court denied plaintiffs' Motion for Assessment of Costs, directing that each party cover its own costs of litigation.

Thereafter, plaintiffs sought to collect on the breach of contract, but in order to do so were required by the District Court to accept the $4.00 in actual damages awarded on the breach of fiduciary duty claim. They accepted the $4.00 under protest and thereafter filed a timely appeal.

Plaintiffs raise several issues on appeal: (1) that the District Court erred in entering judgment notwithstanding the verdict striking the jury award of punitive damages for breach of fiduciary duty; (2) that the District Court erred in barring the plaintiffs from offering certain evidence of lost profits with regards to the claim for breach of fiduciary duty; (3) that the District Court erred by entering judgment notwithstanding the verdict for defendant on the claim for tortious interference with prospective business advantage; and (4) that the District Court erred by failing to award costs to plaintiffs as the prevailing parties.[1]

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[1] Along with their brief, Defendants filed a Motion to Strike from Appellants' Appendix Items not in the Record. The objections to Appellants Proposed Exhibit 133 and Proposed Exhibit 152 which pertain to the PEAK device need not be

Waiver of Right to Appeal

Defendants first argue that plaintiffs have waived their right to appeal by accepting payment of the total judgment entered by the District Court for $518,005.[2] They contend that acceptance of the $4.00 awarded for breach of fiduciary duty is a satisfaction of that claim from which an appeal cannot be taken, and that plaintiffs cannot accept the benefits of a judgment while at the same time working to overturn that judgment.

Defendants' argument is in error. Acceptance of payment of an unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction precluding appeal. *United States v. Hougham*, 364 U.S. 310, 312 (1960). In order to act as a waiver of appeal, a party's acceptance must be voluntary and intended as satisfaction of the judgment. *H & S Industries*, 525 F.2d at 765; *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367, 370 (11th Cir. 1987). "It is the 'mutual manifestation of an intention to bring the litigation to a definite conclusion

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decided because of this court's holding on that claim, Appellants' Exhibit 70 (tax return of Jack Grynberg) is properly included in the briefs because a reviewing court may undertake a post-trial determination of the Defendant's economic status for purposes of reviewing a punitive award (*See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991)); and Defendants' opposition to portions of the Vener Deposition is moot because Plaintiffs have no objection to striking those portions of the deposition. Defendants also filed a Motion to Include Certain Items Within Supplemental Appendix. We admit these items based on 10th Circuit Rule 10.3.3.

[2] In a diversity case, the appealability of a judgment is governed by federal law. *United States ex rel. H & S Industries, Inc. v. F.D. Rich Co.*, 525 F.2d 760, 764 (7th Cir. 1975).

upon a basis acceptable to all parties' which bars a subsequent appeal, and not the fact, standing alone, that benefits under the judgment were accepted." *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969) (citing *Gasden v. Fripp*, 330 F.2d 545, 548 (4th Cir. 1964)).

Plaintiffs did not voluntarily accept the $4.00 award for breach of fiduciary duty. In order to collect on the breach of contract claim, they were compelled by the District Court to collect on the breach of fiduciary duty claim, and they did so only under protest. Such an acceptance was not voluntary. Neither was it intended by the plaintiffs to satisfy the judgment and bring the litigation to a conclusion. In this instance, plaintiffs' acceptance did not act as a waiver of their right to appeal.

Punitive Damages

The jury found that defendants breached the fiduciary duty owed plaintiffs and awarded them $1.00 each in actual damages. The District Court entered judgment on the actual damage award and defendants did not cross-appeal contesting its validity.[3] Therefore, we accept that

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[3] Defendants do not contest the entry of judgment for Plaintiffs on the breach of fiduciary duty claim. However, they raise this issue as an alternate reason for upholding the District Court's decision to vacate the punitive awards. Relying on *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22 (10th Cir. 1984), Defendants contend that the breach of fiduciary duty claim should not have been submitted to the jury because it was subsumed in the contract claim. They argue that since punitive damages are not recoverable in a contract claim, Plaintiffs are not entitled to

defendant was in fact a fiduciary and that he breached his duty. The only issues before us are whether the evidence supported an award of punitive damages for that breach, and if so, whether the amount awarded by the jury was excessive.

We review *de novo* the granting of a motion for judgment notwithstanding the verdict, applying the same standard as the trial court should when deciding the motion. *Meyers v. Ideal Basic Industries, Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991). Under this standard, the court must view all of the evidence in the light most favorable to the nonmoving party, and then determine whether there is evidence upon which the jury could have properly relied in returning a verdict for the nonmoving party. *Id.* The court may not reweigh the evidence or substitute its judgment for the jury's. *Tennant v. Peoria & Pekin Union Railroad*, 321 U.S. 29, 35 (1944). If there is evidence upon

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punitive damages on the tort claim. However, Colorado law is quite clear that if the breach of contract would also constitute an independent tort, punitive damages are recoverable. *Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900, 903-04 (Colo. 1987); *see also, Colorado Interstate Gas Company, Inc. v. Chemco, Inc.*, 833 P.2d 786, 792 (Colo. Ct. App. 1991). We see no difference where, as here, the tort claim is raised separately. Furthermore, the tort sued on in *Isler* was negligence. 749 F.2d at 23. In *Isler*, the court saw the negligence claim as nothing more than an attempt to circumvent the operation of the Commercial Code and rewrite the contract. *Id.* That is not the case here where the Plaintiffs could have sought punitive damages on the contract claim based upon *Podleski*. *Isler* itself recognized the exceptions to its ruling, such as fraud and unconscionability. *Id.* The intentional tort of breach of fiduciary duty alleged in this case is closer to those exceptions.

which the jury could have properly relied in reaching its verdict, that verdict must stand.

In a diversity case, whether punitive damages are warranted is a matter of state law.[4] *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809 (10th Cir. 1990), *vacated*, 499 U.S. 915 (1991). Under Colorado law, to be entitled to punitive damages in a tort claim, a plaintiff must prove beyond a reasonable doubt that the injury complained of was attended by circumstances of fraud, malice or wanton disregard of the rights and feelings of the plaintiff. § 13-21-102, 6 C.R.S. (1973); § 13-25-127(2), 6 C.R.S. (1973); *Tri-Aspen Construction Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986) (en banc).

At trial, plaintiffs presented testimony and other evidence to support their version of events, as described more fully above. The record is replete with evidence of defendants' reprehensible conduct. Most significantly, Henry Klein testified to the abuse he suffered at the hands of Jack Grynberg. In his own testimony, defendant agreed with the general course of events, but denied specific incidents as recounted by plaintiffs and their witnesses.

Thus, the jury was presented with conflicting testimony regarding certain events and the motivations behind defendant's actions. In such a case, it is the jury's prerogative to weigh the credibility of the witnesses and

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[4] Jurisdiction in this case is based upon diversity. Therefore, this court must follow Colorado law in determining the substantive issues of law presented in this appeal. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

determine [sic] should be believed. The Supreme Court in *Tennant v. Peoria & Pekin Union Railroad* described the jury's function this way: "It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select among conflicting inferences and conclusions that which it considers most reasonable. . . . That conclusion . . . cannot be ignored." 321 U.S. at 35 (citations omitted).

The District Court entered judgment as a matter of law striking the exemplary damage award because it believed that the defendant's conduct was not as egregious as some defendants' conduct in cases where large punitive damage awards were allowed. The court thought that defendant's acts were "not completely egregious in nature," but it is not the court's prerogative to substitute its opinion of what constitutes egregious behavior for that of the jury.

Because there was testimony and other evidence to support the plaintiffs' contentions and the jury was properly instructed on the reasonable doubt standard for exemplary damages,[5] we find no reason to believe that

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[5] The jury was given Jury Instruction No. 83 which reads as follows:

> If you find in favor of the Plaintiffs, Gur Shomron, Amiram Grynberg, and Henry Klein, and award them actual damages for their claims of breach of fiduciary duty, then you shall consider whether exemplary damages should be assessed against the Defendants. If you find beyond a reasonable doubt that the injury complained of was attended by circumstances of fraud, malice, or wanton and reckless

the jury was incorrect in its determination that punitive damages were warranted. The presence of conflicting testimony need not prevent a jury from deciding that one side has proven the existence of facts beyond a reasonable doubt. There was ample evidence, if believed to be true, that was properly relied upon by the jury and could support a punitive award beyond a reasonable doubt.

In some instances, however, there may be evidence in the record to support a punitive award, but the figure arrived at by the jury is unreasonable. When a court concludes that there was error only in the excessive damage award, but no error tainting the finding of liability, it may order a remittitur or grant a new trial if the plaintiff refuses to accept the remittitur. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983).

There is no bright line between an acceptable and an unacceptable award of punitive damages. *TXO Production Corp. v. Alliance Resources Group*, ___ U.S. ___, ___, 113 S.Ct. 2711, 2720, (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991). Instead, the standard is one of reasonableness. This court in *Malandris* delineated that standard as "whether the punitive damage award was so excessive that is [sic] shocks the judicial conscience or

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disregard of the rights and feelings of the Plaintiffs, then in addition to actual damages, you may also assess a reasonable sum as exemplary damages.

Exemplary damages, if assessed, are to be assessed as punishment of the Defendants, and as an example to others.

We note that the instruction used appears to be substantially the same as that given in *Post Office*. *See* 913 F.2d at 808.

leads to the inescapable inference that it resulted from improper passion or prejudice on the part of the jury." *Malandris*, 703 F.2d at 1177. *See also TXO*, 113 S.Ct. at 2714, 2725.

The defendants contend that a 1,000,000 to 1 ratio of exemplary to actual damages is impermissible. Certainly, high ratios deserve "close judicial scrutiny." *Post Office*, 913 F.2d at 811. However, this court has never held that any ratio is per se excessive. Rather, the ratio "is merely one factor to consider in reviewing the excessiveness of an award." *Id.* at 810.

Although there is a great disparity between the actual damages and the exemplary award in this case, nominal actual damages can sustain an exemplary damage award. *See, e.g., Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987) (50,000:1 ratio of punitive to actual damages upheld). Moreover, the Supreme Court recently held that the dramatic disparity between actual damages and a punitive award is not controlling. *TXO*, 113 S.Ct. at 2713. Instead, a court must also consider other factors, such as (1) the magnitude of the potential harm to the intended victims, (2) the possible harm to other victims if similar future behavior is not deterred, (3) the financial gains that the defendant hoped to achieve through his scheme, (4) whether the scheme was a part of a larger pattern of fraud and trickery, (5) the bad faith of the defendant, and (6) the petitioner's wealth. *Id.* at 2721-22.

Colorado courts have outlined four factors to consider when determining whether a punitive award is reasonable: (1) the nature of the act which caused the injury; (2) the economic status of the defendant; (3) the

deterrent effect of the award on others; and (4) the relation to the compensatory award. *Malandris*, 703 F.2d at 1177.

The jury in this case believed that the defendant acted maliciously. The amount of money potentially at stake in this venture was substantial. Through his scheme, defendant hoped to reap sizable financial gains by fraudulently securing the Defendisk system for himself. Defendant argues that he did not realize financial benefit from any wrongs to the plaintiffs. This ignores the fact that he apparently intended to, but his own actions prevented the company from becoming profitable. Furthermore, the jury could have concluded that defendant must be deterred from committing similar acts to future business associates. Finally, the defendant is apparently a wealthy man, and the jury could have determined that a sizable award was necessary to punish and deter him.

The jury was properly instructed regarding the burden of proof, and there was sufficient evidence in the record to support its finding that exemplary damages were warranted. The trial court, however, was "shocked" by the sheer size of the verdict. The defendant's conduct was indeed deplorable, but the jury assessed the actual damages at only $4.00. Certainly, considering the nature of the conduct involved, a sizable exemplary award was warranted, but the $3,000,000 figure seems excessive. Under these circumstances, we think it proper that a remittitur be granted by the trial court, who is in the best position to make a just determination. Moreover, there is inadequate evidence in the record to determine defendant's ability to pay, and the District Court can hold a hearing to ascertain defendant's current economic status.

If the plaintiffs do not accept the reduction, a new trial should be granted on this issue.

Lost Profit Evidence

Plaintiffs contend that the District Court erred by precluding them from offering certain expert testimony from Lester Thompson regarding lost profits on their claim for breach of fiduciary duty. Rulings limiting testimony are reviewed for abuse of discretion and are reversible only after a showing of prejudice to substantial rights or manifest injustice.[6] Fed. R. Evid. 103(a)(1); *Polys*, 941 F.2d at 1407; *Marsee v. United States Tobacco Co.*, 866 F.2d 319, 323 (10th Cir. 1989). Here, the jury awarded breach of contract damages and breach of fiduciary damages in an amount smaller than admitted evidence would have supported, which suggests that plaintiffs were not prejudiced by the exclusion of this evidence. Plaintiffs have failed to show prejudice, and, therefore, we affirm the District Court's ruling.

Tortious Interference with Prospective Business Advantage

In 1983, plaintiff Ami Grynberg developed, in addition to the Defendisk System, a security device for computer hardware known as the Personal Electronic Access

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[6] Defendants contend that Plaintiffs failed to make an offer of proof at trial regarding Mr. Thompson's testimony, and therefore this court can only reverse if "there was plain error affecting a party's substantial rights." *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1408 (10th Cir. 1991). Under either standard, we find no prejudice to Plaintiffs.

Key ("PEAK"). He alleges that Jack Grynberg undertook an intentional course of conduct to interfere with the formation of a contract between him and third parties for the financing of the PEAK system. The jury awarded Ami Grynberg $200,000 in actual damages and $350,000 in punitive damages for tortious interference with prospective business advantage, but the District Court entered judgment as a matter of law for defendants, finding the claim "so speculative it's scary."

Again, we review *de novo* a judgment notwithstanding the verdict, applying the same standard that the District Court should apply: Is there evidence in the record upon which the jury could have properly relied in returning a verdict for the nonmoving party? *Meyers v. Ideal Basic Industries, Inc.*, 940 F.2d 1379, 1383 (10th Cir. 1991). A verdict is proper only if supported by more than a scintilla of evidence. *Id.* When, as here, jurisdiction is based upon diversity, we also review *de novo* the District Court's interpretation of the substantive state law. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

To establish a claim for tortious interference with prospective business relations, a plaintiff must show intentional and improper interference preventing the formation of a contract. *Behunin v. Dow Chemical Company*, 650 F. Supp. 1387, 1392-93 (D. Colo. 1986); *Dolton v. Capital Federal Savings and Loan Association*, 642 P.2d 21, 23 (Colo. Ct. App. 1981). The defendant can interfere either by inducing or causing a third party not to enter into or continue relations, or by preventing the plaintiff from acquiring or continuing the relations. *Behunin*, 650 F. Supp at 1393. It is not necessary to prove an underlying contract. *Wasalco, Inc. v. El Paso County*, 689 P.2d 730, 732

(Colo. Ct. App. 1984). However, a protected relationship exists only if there is a reasonable likelihood or probability that a contract would have resulted; there must be something beyond a mere hope. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 898 (3rd Cir. 1981); *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Penn. 1979); *cf. Plaza Esteban v. La Casa Nino, Inc.*, 738 P.2d 410, 412 (Colo. Ct. App. 1987) (requiring a "firm offer"), *rev'd on other grounds*, 762 P.2d 669 (Colo. 1988).

The court below held that in this case the prospective benefits were too speculative to support an award for tortious interference with prospective business advantage; that plaintiff had a "mere hope" of a prospective relationship. We agree. Plaintiff had no ongoing relationship with any of the investors. *Cf. Behunin*, 650 F. Supp. at 1393; *Plaza Esteban*, 738 P.2d at 412. Indeed, he had only one meeting with each. Plaintiff offered no evidence that any of the prospective investors had the intent to finance his invention; there is no evidence of what the investors thought of the project. The evidence does not support a finding that Ami Grynberg enjoyed a reasonable probability of receiving any economic benefits from these investors.

Plaintiff failed to make a prima facie case for tortious interference with prospective business advantage because there was no evidence establishing a reasonable probability that he would have received economic benefits from these investors. Thus, we affirm the District Court's judgment notwithstanding the verdict on plaintiffs' claim for tortious interference with prospective business advantage.

Costs

Federal Rule of Civil Procedure 54(d) authorizes an award of costs to prevailing parties. The Rule states that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). This court has held that Rule 54(d) creates a presumption that the prevailing party shall recover costs. *True Temper Corp. v. CF&I Steel Corp.*, 601 F.2d 495, 509-10 (10th Cir. 1979). A district court's denial of costs is reviewed for an abuse of discretion. *Id.*

The court below denied plaintiffs' Motion for Assessment of Costs, finding that the litigation was complex, "close" and protracted, and that the delay was neither party's fault. The court also noted that the plaintiffs did not prevail on all of their claims. For these reasons, the court directed that each party bear its own costs.

Plaintiffs were awarded over $500,000 on their breach of contract claim. In addition, pursuant to our holding, they are entitled to punitive damages on their breach of fiduciary duty claim. Plaintiff prevailed on the major issues in this case. To deny them costs would be in the nature of a severe penalty imposed upon them, and there must be some apparent reason to penalize the prevailing party if costs are to be denied. *Serna v. Manzano*, 616 F.2d 1165, 1167 (10th Cir. 1980); *True Temper Corp.*, 601 F.2d at 509. We find no justification to penalize plaintiffs because this litigation was complex or lengthy. Defendants' own actions brought about the litigation. Accordingly, we hold that the District Court's denial of costs to the plaintiffs was an abuse of discretion.

Conclusion

For the reasons stated, the District Court's judgment is affirmed in part and reversed in part. The cause is remanded to the District Court with directions that it reinstate that part of the jury verdict awarding exemplary damages for breach of fiduciary duty and then grant an appropriate remittitur; the District Court should also make an appropriate assessment of costs against defendants. In so ordering, we emphasize this court's view that the plaintiffs are entitled to significant punitive damages. If plaintiffs accept the reduction of the exemplary award, then judgment as so modified shall be final; otherwise, an order shall be entered granting a new trial.

APPENDIX C

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit [sic] at the rate

provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 84-S-1593 and 84-S-2429

HENRY KLEIN (Realigned as Plaintiff); GUR SHOMRON; AMIRAM GRYNBERG; and DEFENDISK, LTD., an Israeli corporation,

Plaintiffs,

v.

JACK GRYNBERG (Realigned as Defendant); DEFENDISK, INC., a Colorado corporation (Realigned as Defendant); and GRYNBERG PETROLEUM COMPANY, a Colorado corporation,

Defendants.

ORDER
(Filed May 24, 1996)

THIS MATTER comes before the court on the Plaintiffs' Motions To Tax Postjudgment Interest pursuant to 28 U.S.C. § 1961, filed May 13, 1996 and May 20, 1996. The court has reviewed the motions, Defendant Grynberg's response in opposition, the entire case file, and the applicable law and is fully advised in the premises.

"Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calculated from the date of the entry of the judgment, . . . " 28 U.S.C. § 1961. Judgment on the jury's verdict entered in this case on March 31, 1992, awarding

the Plaintiffs compensatory damages for breach of contract, breach of fiduciary duty, and intentional interference with prospective contractual relation and punitive damages for breach of fiduciary duty and intentional interference with prospective contractual relation. An Amended Judgment entered on June 29, 1992, representing the district court's judgment as a matter of law striking the intentional interference with prospective contractual relation claim and all of the punitive damages. A Second Amended Judgment was entered on August 26, 1992, reflecting correction of clerical errors.

On appeal, the Tenth Circuit reversed the district court's striking of the punitive damages award and remanded for determination of a remittitur or in the alternative for a new trial. *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995). On April 19, 1996, an Amended Judgment was entered reflecting the district court's March 15, 1996 Order of Remittitur and the Plaintiffs' acceptances of the remittitur in the amount of $200,000.00 in punitive damages for each of the three individual Plaintiffs for the breach of fiduciary duty claim. Plaintiffs now seek post-judgment interest on the final judgment entered April 19, 1996 from March 31, 1992, the date of the original jury verdict.

Pursuant to Fed. R. App. P. 37,

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. *If a judgment is modified or reversed with a direction that a judgment for money be entered in the*

> *district court, the mandate shall contain instructions with respect to allowance of interest.*

(Emphasis added). Pursuant to the Advisory Committee Notes to Fed. R. App. P. 37,

> In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, *for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal.* In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest form [sic] the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the *Briggs* rule, since the rule directs that the matter of interest be disposed of the mandate, in case where interest is simply overlooked, a party who conceives himself entitled to interest form [sic] a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

(Emphasis added).

In this matter, the Tenth Circuit Court of Appeals reversed the district court's order of judgment as a matter of law and remanded for a determination of punitive damages. Until the district court made the determination of damages on remand, the judgment amounted to four dollars ($4.00) for compensatory damages and zero for punitive damages. The Tenth Circuit directed that "[i]f plaintiffs accept the reduction of the exemplary award, then judgment as so modified shall be final; otherwise, an order shall be entered granting a new trial." *Klein*, 44 F.3d at 1507. The mandate contained no directions concerning the awarding of postjudgment interest. In light of Fed. R. App. P. 37, in light of the Tenth Circuit's complete reversal of the district court's determination regarding punitive damages, and in light of the instructions from the Tenth Circuit that the judgment would become final upon the Plaintiffs' acceptance of a remittitur or alternatively, there would be a new trial, this court considers it improper to award the requested postjudgment interest to the Plaintiffs under the circumstances of this case.

Accordingly, IT IS ORDERED that the Plaintiffs' Motions To Tax Postjudgment interest are DENIED. Postjudgment interest in this matter shall be taxed from the date of the district court's April 19, 1996 Judgment after remand.

Dated at Denver, Colorado this 24th day of May, 1996.

BY THE COURT:

/s/ Daniel B. Sparr
Daniel B. Sparr
U.S. District Judge

Case No. 84-S-1593/84-S-2429

No. 96-716

Supreme Court, U.S.
FILED
DEC 6 1996
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In The

Supreme Court of the United States

October Term, 1996

JACK J. GRYNBERG,

Petitioner,

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there is any issue worthy of review by Writ of Certiorari with respect to the date from which post-judgment interest accrues on a punitive damages award pursuant to 28 U.S.C. § 1961.

Whether the Circuit Courts of Appeal have consistently applied this Court's holding in *Kaiser Aluminum & Chemical Corporation v. Bonjorno.*

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gur Shomron, Amiram Grynberg, Henry Klein and Defendisk, Limited, respectfully submit the following Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari has its genesis in litigation filed 12 years ago. Respondents sought compensatory and punitive damages from the Petitioner for, *inter alia*, breach of contract and breach of fiduciary duty, related to a computer software system invented by them to prevent unauthorized copying and piracy of software. Eight years after the action was commenced, and after a six week jury trial, on March 31, 1992, judgment was entered on a jury verdict in excess of $500,000.00 in compensatory damages for breach of contract and breach of fiduciary duty, and for $3,000,000.00 in punitive damages ($1,000,000.00 for each Plaintiff).

On June 24, 1992, the District Court, after a hearing on post-trial motions, struck the jury's punitive damage award. Respondents appealed, and the Tenth Circuit reversed, holding that "[b]ecause there was testimony and other evidence to support the Plaintiffs' contentions and the jury was properly instructed on the reasonable doubt standard for exemplary damages, [there was] no reason to believe that the jury was incorrect in its determination that punitive damages were warranted." *Klein v. Grynberg*, 44 F.3d 1497, 1504 (10th Cir. 1995). The Tenth

Circuit, however, held that although a "sizeable exemplary award was warranted," the "$3,000,000.00 figure seems excessive", *Id.* at 1505, and directed the trial court to enter a remittitur. In doing so, the Tenth Circuit emphasized "that the Plaintiffs are entitled to significant punitive damages." *Id.* at 1507.

The District Court remitted the original punitive damages award to $200,000.00 per Plaintiff (for a total of $600,000.00), giving Respondents the option to accept the remittitur or undergo a new trial solely on the issue of punitive damages. Respondents accepted the remittitur in the interest of bringing this litigation to a close, and requested the District Court tax interest on the punitive damages award from March 31, 1992. The District Court refused and Respondents sought a recall of the Tenth Circuit's mandate for purposes of establishing March 31, 1992 as the date from which post-judgment interest began to accrue.

The Tenth Circuit recalled its mandate and correctly ordered that post-judgment interest accrue on the remitted punitive damages award from the date of entry of the original judgment. Emphasizing the degree to which its prior opinion reversed the District Court's striking of the punitive damages award, Pet. App. A at A-3, the Tenth Circuit properly held that its "reversal 'was not on any basic liability errors or errors in procedure which affected the basic issues, *but on a dollar value*, a matter of degree.' " *Id.* (quoting *Northern Natural Gas Company v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987)) (emphasis in original). Petitioner now seeks review of the Tenth Circuit's decision on the basis of a manufactured "split" among the Circuit Courts of Appeals which have had occasion to

consider a similar issue. Further, Petitioner advocates a unique and unnecessary change in the law regarding post-judgment interest solely as it relates to an award of punitive damages. As more fully set forth below, Petitioner's assertion that a split among the Circuits exists is false. Furthermore, there is no legitimate reason why this Court should establish an arbitrary rule for the accrual of post-judgment interest solely as to punitive damages.

REASONS FOR DENYING CERTIORARI

This Court, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), established the touchstone for determining the date from which post-judgment interest should accrue where several judgments exist as a result of either post-trial proceedings or appeals. The federal interest statute, 28 U.S.C. § 1961, provides that, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). The statute applies equally to awards of compensatory and punitive damages.

In *Kaiser*, this Court, in interpreting 28 U.S.C. § 1961, announced that post-judgment interest accrues only after an award of damages is " 'ascertained' in a meaningful way." *Kaiser*, 494 U.S. at 836. *Kaiser*, however, involved its own unique procedural situation. Naturally, the Circuit Courts of Appeals are required to apply the *Kaiser* standard to a broad spectrum of differing factual and procedural circumstances. Despite this, the various Courts of Appeals have applied the rule of *Kaiser* consistently and

the alleged conflict among the Circuits to which Petitioner points as a basis for certiorari is indeed not a conflict at all. Rather, the Circuit Courts of Appeals, including the First, Second, Third, Sixth, Tenth and Eleventh Circuits, have developed, consistent with *Kaiser*, additional tests for determining the date from which post-judgment interest accrues when factual and procedural nuances render a particular case different from *Kaiser*. Indeed, cases involving similar procedural postures have resulted in similar decisions which are in no need of further refinement.

Additionally, the purpose of punitive damages would not be served by awarding post-judgment interest, as Petitioner suggests, only after a punitive damages award is finalized after appeal. Doing so undermines statutorily provided monetary benefits to Respondents and provides a significant windfall to defendants such as Petitioner who have engaged in conduct "attended by circumstances of fraud, malice or wanton disregard of the rights and feelings of the plaintiff." *Klein*, 44 F.3d at 1503 (citing C.R.S. § 13-21-102). Petitioner's position also contravenes the purposes underlying the provision of post-judgment interest by encouraging abuse of the appellate process without the corresponding obligation to pay post-judgment interest should an appeal ultimately fail.

Application of the *Kaiser* standard to punitive damage awards remains proper and is not affected by recent Supreme Court decisions merely reaffirming federal constitutional standards applicable to punitive damages. *See BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996). *Kaiser* and subsequent interpretations by the Circuit

Courts of Appeals provide flexibility necessary to maintain a meaningful balance between the interests of a plaintiff and a defendant who, though having been found liable for malicious conduct, wishes to appeal a punitive damages award. Thus, this case involves neither a controversy among the various Circuit Courts of Appeals nor a substantial question of federal law which must be addressed in light of recent Supreme Court decisions.

I. THE DATES OF ACCRUAL OF POST-JUDGMENT INTEREST AWARDS HAVE BEEN CONSISTENTLY DETERMINED BY THE COURTS OF APPEALS.

The various Circuit Courts of Appeals have utilized, to the extent applicable, the mandate of *Kaiser* uniformly and consistently. Indeed, contrary to Petitioner's argument, differences among the circuits can be attributed solely to unique factual and procedural differences among the cases. The Tenth Circuit has consistently looked to the extent to which a particular judgment is reversed on appeal in determining the date from which post-judgment interest should accrue. Other Circuit Courts are in accord.

In *Kaiser*, the trial court found that the original jury verdict was not supported by the evidence, *Kaiser*, 494 U.S. at 835, and neither the plaintiff nor the defendant appealed that determination. *Id.*; *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102, 119 (E.D. Pa. 1981) (proof of plaintiffs damages was deficient such that

no reasoned basis could be found for setting an appropriate figure). After a limited retrial solely on the issue of damages, the jury again entered a verdict in favor of the plaintiff, which verdict was subsequently upheld on appeal. *Kaiser*, 494 U.S. at 830-831. The Supreme Court held that because "the judgment on damages was not supported by the evidence, the damages [had] not been 'ascertained' in any meaningful way", *Id.* at 836, and taxed post-judgment interest from the date of the second jury verdict. *Id.*

Petitioner argues that the First, Third and Tenth Circuits apply *Kaiser* narrowly while the Second, Sixth and Eleventh take a broader approach which would have ultimately led to a different decision in this case. The cases cited by Petitioner as applying *Kaiser* narrowly, however, involve distinct procedural circumstances; not a different substantive application of *Kaiser*.

In *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730 (10th Cir. 1987), the trial court's method of valuation of helium extracted from a natural gas stream was reversed and remanded. *Id.* at 732. The Tenth Circuit, in determining the date from which post-judgment interest accrued, looked to the extent to which the judgment on appeal was reversed. *Id.* at 737 (quoting *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979)). Where there exists "a large dollar difference but the reversal was not on any basic liability errors or errors in procedure which affected the basic issues but on a dollar value, a matter of degree", the court reasoned that the date of the original judgment should be utilized. *Id.* Similarly, in *Stewart v. Donges*, 20 F.3d 380 (10th Cir. 1994), cited by

Petitioner as being in conflict with *Kaiser*, the Tenth Circuit held that when:

> 'an initial quantified judgment is later decreased, interest runs from the date of the earlier quantified judgment and only on the amount ultimately allowed.' This rule is qualified by the caveat that in cases of reversal, the extent to which a judgment is invalidated on appeal determines whether the first judgment or the remand judgment triggers the accrual of post-judgment interest.

Stewart, 20 F.3d at 382 (citation omitted).[1] Petitioner, however, neglects the fact that *Stewart* explicitly distinguished *Kaiser*. "Thus, cases cited . . . which reach a contrary result but are based on appellate reversals which *substantively* and *substantially* alter the conclusion of the district court are inapposite." *Stewart*, 20 F.3d at 382 n.2 (emphasis added).

Petitioner's reliance upon *Cordero v. DeJesus-Mendez*, 922 F.2d 11 (1st Cir. 1990), as a case factually similar to this case and to *Kaiser*, is also misplaced. The First Circuit specifically distinguished *Kaiser*.

> Unlike *Kaiser*, adequate evidence supported the jury's award and unlike *FDIC v. Rocket Oil Co.*, [865 F.2d 1158 (10th Cir. 1989)], the jury's initial determination of liability was upheld. A fair damages award could have been made by the jury after the first trial in the present case had

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[1] *Stewart* relied upon the decisions of the Tenth Circuit in *Wheeler v. John Deere Co.*, 935 F.2d 1090 (10th Cir. 1991), and a later decision in the same case, *Wheeler v. John Deere Co.*, 986 F.2d 413 (10th Cir. 1993).

> the jury been instructed properly. Calculating interest from the date of the second judgment would penalize appellees for the trial judge's error . . . Because we believe that *Kaiser* does not control the present case, post-judgment interest on the modified damages award . . . shall accrue from the date of the first judgment.

Cordero, 922 F.2d at 18. The Sixth Circuit, contrary to Petitioner's argument, provides an additional example of the uniform application of the *Kaiser* standard. The very case cited by Petitioner, *Adkins v. Asbestos Corp., Ltd.*, 18 F.3d 1349 (6th Cir. 1994), demarcates the dividing line as to when damages are ascertained in a meaningful way.

In *Adkins*, the original judgment was "vacated in its entirety on the first appeal and the district court was ordered to support its award of damages with specific findings of fact and conclusions of law." *Adkins*, 18 F.3d at 1351. The Sixth Circuit, citing *Kaiser*, held that post-judgment interest should accrue from the date of the entry of the remanded judgment. Its holding, however, necessarily distinguished *Coal Resources, Inc. v. Gulf & Western Ind., Inc.*, 954 F.2d 1263 (6th Cir. 1992). In that case, the Sixth Circuit distinguished *Kaiser* "and awarded interest from the date of the original judgment because the original judgment *had not been vacated* on appeal but had simply been reduced by a certain amount following a court ordered remittitur." *Adkins*, 18 F.3d at 1351 (emphasis added). "[A]ccordingly, in *Coal Resources*, the Court concluded that because the damages had been meaningfully ascertained at the date of the original judgment, it was proper to award post-judgment interest from that date." *Id.* Thus, *Adkins* is factually and procedurally

distinguishable from *Coal Resources* because "the original judgment was vacated in its entirety on the first appeal and the district court was ordered to support its award of damages with specific findings of fact and conclusions of law." *Id.* at 1352.

Petitioner ignores these factual dissimilarities which uniformly govern the proper application of *Kaiser*. Simply put, a vacated judgment (as in *Adkins*), is both *factually* and *procedurally* distinct from a court ordered remittitur, (as in *Coal Resources* and the case at bar) and the Sixth Circuit's application of *Kaiser* is in accord with the other Circuit Courts of Appeals. *See* Pet. App. A at A-4, (citing *Litwinowicz v. Weyerhaeuser Steamship Co.*, 185 F. Supp. 692, 693-694 (E.D. Pa. 1960) (interest accrues on reduced amount from the date of judgment on the greater amount because the judgment was modified, not vacated); *Brockelherst v. PPG Industries, Inc.*, 907 F. Supp. 1106, 1109-1110 (E.D. Mich. 1995) (because plaintiffs consent to remittitur did not create a new judgment, but only modified a prior judgment, interest accrues from the date of the initial judgment)). *See also, Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977) (interest does not accrue on a vacated judgment).

The Second Circuit likewise follows the reasoning of the First, Third, Sixth and Tenth Circuits. Petitioner's reliance upon the decision in *Andrulonis v. U.S.*, 26 F.3d 1224 (2d Cir. 1994), ignores the substantive principles of law applicable to that case. *Andrulonis* involved a judgment "against the United States Government . . . under the Federal Tort Claims Act . . . and a third party claim for contribution brought by [the United States] Government against the New York State Department of Health

. . . under New York law." *Andrulonis*, 26 F.3d at 1227. The Second Circuit, not surprisingly, held that it was only when the United States government paid the plaintiff more than its pro rata share of the primary judgment that the "contribution award ripened into an ascertained judgment capable of sustaining an award of interest." *Id.* at 1234. Petitioner inexplicably ignores that this holding finds its basis in "third-party practice and the underlying *substantive law of contribution*." *Id.* at 1233 (emphasis added). "Because the underlying right to contribution is necessarily conditioned upon the defendants' satisfaction of the primary judgment, the judgment entered upon that claim should reflect this contingency." *Id.* at 1234. So construed, post-judgment interest could not be calculated on the contingent amount awarded *before* the date the contingency was satisfied. *Id.* at 1234-1235. Entirely consistent with *Andrulonis*, in *Indu Craft, Inc. v. Bank of Baroda*, 87 F.3d 614 (2d Cir. 1996), the Second Circuit held that when the jury's factual findings are not disturbed on appeal and the original judgment is substantiated by the evidence, post-judgment interest should accrue from the date of the original judgment. *Indu Craft*, 87 F.3d at 620.

The factual and procedural differences among the various cases cited above and by Petitioner do not create a conflict among the Circuit Courts of Appeals in their substantive application of *Kaiser*. Cases which do not involve vacated judgments, but rather, remanded or remitted judgments, consistently focus on the degree to which such judgments were reversed on appeal for purposes of determining the date from which post-judgment interest accrues. This approach, utilized by the Tenth Circuit in this case, as well as the First, Second, Third,

Sixth, Eighth and Eleventh Circuits, merely represents a uniform attempt to determine the point in time when damages have been "meaningfully ascertained" in the myriad of differing procedural postures with which the Courts of Appeals must deal. Consequently, there is no conflict among the circuits.

II. APPLICATION OF EXISTING STANDARDS TO POST-JUDGMENT INTEREST ON PUNITIVE DAMAGE AWARDS REMAINS PROPER.

Petitioner states that a Plaintiff awarded punitive damages "suffers no diminution of his remedy while an unliquidated or modified award undergoes judicial review." Pet. for Cert. at 12. From this, Petitioner reasons that punitive damages which are reduced following remand become "meaningfully ascertained" only after such remanded judgment enters. *Id.* at 15. The premise from which Petitioner embarks is false; such a *new* rule for punitive damages awards would provide a substantial windfall to wrongdoers such as Petitioner and ignores the purposes of both punitive damages and post-judgment interest. Indeed, Petitioner would have Respondents, the victims of conduct which the Tenth Circuit found egregious and malicious, *Klein*, 44 F.3d at 1503-1504 ("the record is replete with evidence of Defendant's reprehensible conduct"), bear the burden of the District Court's error.

"Punitive damages have long been a part of traditional state tort law." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991), and "may properly be imposed to

further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 1595 (1996).[2] Denying statutory interest to the injured party until the appellate process is exhausted in no way effectuates the retributive purpose underlying punitive damages. Indeed, the absence of the accrual of post-judgment interest would erode the relative amounts awarded to Respondents. *Cf.*, *BMW*, 116 S.Ct. at 1608-1609 (Breyer, J. concurring) (discussing rates of inflation which would decrease the present value of a punitive damages award over time).

Furthermore, Petitioner's argument ignores the fundamental purpose underlying the imposition of post-judgment interest. 28 U.S.C. § 1961 provides for post-judgment interest on *any* money judgment as a means of both "deterring abuse of the appellate process by dissuading a litigant from pursuing review simply for the purpose of delay", Pet. for Cert. at 15 (citing *Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988)), and compensating "the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage

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[2] Petitioner's argument appears to be based, at least in part, upon *BMW*. However, *BMW* did not change the standard under which federal courts review state court awards of punitive damages. The standard remains the same as in prior case law. "Only when an award can fairly be categorized as 'grossly excessive' in relation to [the state's interest in punishing unlawful conduct and deterring its repetition] does it enter into the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW*, 116 S.Ct. at 1595. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993).

and the payment by the defendant." *Kaiser*, 494 U.S. at 835-836. Accrual of post-judgment interest on an original money judgment only after a remanded judgment provides an incentive to continue frivolous appeals thereby undermining the plain language of 28 U.S.C. § 1961.[3]

Continuing to apply *Kaiser* to punitive damages awards effectuates both the underlying purposes of punitive damages and an award of post-judgment interest, while providing a reasonable and workable balance between a defendant's right to constitutional review of a punitive damages award, *see Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 2342 (1994), and baseless appeals brought solely for purposes of delay.

CONCLUSION

The standard enunciated by the Supreme Court in *Kaiser* has been uniformly and consistently applied to necessarily different factual and procedural issues. The decisions of the various Circuit Courts of Appeals are clear and no conflict exists therein. Likewise, the uniform application of *Kaiser* to post-judgment interest awards provides the best means available for effectuating the underlying purposes of punitive damage awards as well

[3] Petitioner has twice appealed to the Tenth Circuit Court of Appeals, Case Nos. 92-1232, 92-1233 (Cross-Appeal) and 96-1255, and twice sought certiorari (this Petition and No. 94-1898, *cert. denied*, 116 S.Ct. 58 (1995)) from this Court during the four and a half years since the original judgment was entered.

as awards of post-judgment interest. Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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